

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE: ) Case No. 1:17-md-2804  
          )  
NATIONAL PRESCRIPTION )  
OPIATE LITIGATION, )  
                          ) Monday, February 12, 2024  
                          )

TRANSCRIPT OF MOTION HEARING PROCEEDINGS

*HELD VIA ZOOM VIDEOCONFERENCE*

BEFORE THE HONORABLE DAN AARON POLSTER

UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography; transcript produced with computer-aided transcription.

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13 ALSO PRESENT:

14 Carrie Roush, Law Clerk  
15 Corey McCardle, Courtroom Deputy  
16 David Cohen, Special Master  
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1 MONDAY, FEBRUARY 12, 2024

2 - - -

3 (Proceedings commenced at 2:06 p.m.)

4 - - -

5 THE COURT: All right. This is a hearing in  
6 MDL number 2804 on two pending motions, OptumRx's motion to  
7 disqualify Motley Rice and the PEC's motion to amend their  
8 complaints against the PBMs.

9 I've obviously read all the pleadings. I had a few --  
10 I had a few questions, some were factual, some pertain to  
11 the implication of any ruling I make, and I thought rather  
12 than guessing I would invite all responses from our able  
13 counsel. So we'll start with the motion to disqualify  
14 Motley Rice.

15 Motley Rice's response doesn't specifically  
16 acknowledge the details of the relationship you had with the  
17 three public entities, Chicago, Hawaii, and DC. Optum says  
18 that Motley Rice was actually appointed as special AG, you  
19 know, a public -- serving as public officials. The response  
20 just talks about representing those two cities and state.

21 Can Motley Rice specifically -- I want to know  
22 specifically what the arrangement was, so I'd like to know  
23 the specifics of the arrangement; the way you were  
24 compensated; the duration; and in particular, is at least  
25 one of those or any of them continuing till the present, or

1       is it all in the past?

2                   MS. SINGER: This is Linda Singer, Your Honor,  
3 from Motley Rice. I'll respond to the questions.

4                   So Motley Rice was engaged as outside counsel in each  
5 of those matters.

6                   In Hawaii, that is an ongoing representation. Hawaii  
7 is in litigation against three PBMs at the moment related to  
8 the pricing of drugs. We are paid in each of the matters on  
9 a contingent fee basis, although they differ in each matter.

10                  In Hawaii, as outside counsel, we are designated as  
11 special assistant attorney general for purposes of that  
12 representation.

13                  In DC and Chicago we carry no moniker, but, again, we  
14 are outside counsel for the purposes of that matter. In DC  
15 and Chicago, both of those matters had been terminated.

16                  And I would add that each of the contracts contains a  
17 provision that indicates that our work is done subject to  
18 the control and supervision of the attorney general's  
19 office, which maintains control of each of the  
20 investigations in litigation.

21                  THE COURT: Well --

22                  MR. BOONE: Your Honor, if I may --

23                  THE COURT: Let me just stay with -- I mean --  
24 all right.

25                  Linda, you issued subpoenas in some or all of these.

1 I mean, I was a former prosecutor. Private lawyers can't --  
2 I mean, they can issue, you know, requests for admission,  
3 interrogatories, et cetera. You know, you don't issue  
4 subpoenas. Government attorneys issue subpoenas to have  
5 records produced to them. I mean -- so are you saying you  
6 were not -- you had no appointment as a special assistant AG  
7 or a public official in DC and Chicago, you were purely  
8 outside counsel like you have been to hundreds of other --  
9 in hundreds of other cities and counties?

10 MS. SINGER: In each jurisdiction we are  
11 appointed as outside counsel with certain authorities  
12 subject to the office of supervision. Only in Hawaii, to my  
13 knowledge, are we designated a special assistant attorney  
14 general. That's not obviously an employment or a paid  
15 position. In each of those cases decisions have to be made  
16 by the office so that the subpoenas or civil investigative  
17 demands -- they go by different names -- were signed by each  
18 of the public entities, and that decision to issue a CID has  
19 to be made or approved by the public entity. We don't have  
20 that authority.

21 MR. BOONE: Your Honor, but in each case  
22 Motley Rice was wielding government authority. I'm looking  
23 at the state of Hawaii agreement here, it's an exhibit to --

24 THE COURT: Well, the state of Hawaii, they  
25 were -- they have a designation, there's no question that

1       they were performing public functions. They were designated  
2       to perform public functions, and Hawaii's ongoing.

3           All right. There is a -- one of the things, which  
4       Motley Rice did not address in its response, it's  
5       highlighted in the expert reports that Optum filed. There  
6       are confidentiality agreements, all right, that specifically  
7       preclude Motley Rice from using any of the material,  
8       confidential information in connection with any other  
9       matter, and not to use it involving -- in any other matter  
10      relating to Optum. And so Motley Rice didn't -- I need you  
11      to address that because you haven't addressed how that  
12      impacts your involvement in other litigation matter  
13      involving Optum.

14           MS. SINGER: Your Honor, I'm sorry that we  
15      didn't respond and left you with questions, but let me speak  
16      to that specifically.

17           So the information that was produced by OptumRx -- and  
18      to be clear, these subpoenas were issued to all of the PBMs,  
19      so Express Script, OptumRx in Chicago. Not the other PBMs  
20      in Chicago, but Caremark, OptumRx, and Express Script all  
21      received the same subpoena from the DC attorney general and  
22      the Hawaii attorney general. None of those documents were  
23      shared with any other client of Motley Rice. None of them  
24      have been produced into the MDL, and none of them have been  
25      made available to others.

1           I can tell you -- and I want to be crystal clear -- we  
2 did not put in place a formal wall because we consulted with  
3 ethics counsel, believed that because they were all public  
4 matters, no wall was needed, but functionally no attorney  
5 who had access to any document that was produced by OptumRx  
6 in any of these matters has been involved in any way in the  
7 CT-12 through 15 cases.

8           MR. BOONE: Except that Ms. Singer's on the  
9 line with us today.

10           THE COURT: Well, that's what I was going to  
11 ask, Linda. I mean, you seem to be involved in both. I  
12 don't know about anyone else, but, I mean, you clearly were  
13 involved in DC, Hawaii, and you're clearly involved in these  
14 cases.

15           MS. SINGER: And I don't -- I didn't mean to  
16 comply otherwise. What I'm saying is that I never had  
17 access to these documents. I've not seen them. The  
18 complaint filed by Hawaii, which is the only complaint filed  
19 as a result of those investigations, does not reference  
20 opioids or any opioid-related documents, and I personally  
21 haven't seen any of them. I want to be clear, it's our  
22 legal position that, again, none of that matters.

23           THE COURT: Well, I disagree with that. I  
24 think it matters, I mean, considerably because this  
25 public/private distinction you've made I don't think is the

1 case. There's two issues, one to me is the overriding  
2 principle that a public official -- a public employee cannot  
3 have any involvement whatsoever in a private capacity with  
4 any -- any investigation that he or she took place in or any  
5 litigation that he or she took part in as a public official,  
6 right? I understood that. I was a public employee for 22  
7 years. So that's overriding principle number 1.

8 And then you've got this additional provision about  
9 that you can't use any of the documents in any other matter  
10 involving OptumRx, and so --

11 MR. BOONE: Your Honor, if I may.

12 Ms. Singer said the investigations were limited to  
13 pricing. That's just not true. They received thousands of  
14 documents about opioids. They received thousands of  
15 documents about opioid manufacturers, about medications,  
16 formulary development, clinical programs, client  
17 relationships, business strategies, you name it, that is the  
18 stuff of these bellwethers. So what she's saying is just  
19 not true.

20 MS. SINGER: That's not what --

21 THE COURT: I don't know what the stuff of the  
22 bellwethers are yet because we haven't litigated it. The  
23 plaintiffs have made very, very broad allegations in the  
24 complaints, proposed complaints, so --

25 MS. SINGER: And I want to be clear, Your

1 Honor, I did not say that there weren't opioid-related  
2 documents that were produced. I think OptumRx has been  
3 specific about that in its pleadings. The subpoena spoke  
4 generally, both in Hawaii and DC, to prescription drugs in  
5 certain requests, and Optum has indicated that its  
6 production included...

7 (Unclear speech; clarification requested by  
8 court reporter.)

9 MS. SINGER: Documents that referenced  
10 opioids. So, you know, that's OptumRx's position. What I  
11 said was that Hawaii's complaint --

12 THE COURT: All right. I'm also concerned --  
13 I mean, you said that these documents were essentially  
14 confidential, they hadn't -- have not been produced in the  
15 opioid litigation, whether or not they will be produced,  
16 then we won't know. They might be, they might not be. But  
17 they haven't yet been produced, so --

18 MS. SINGER: And, Your Honor, on that point,  
19 if I may.

20 You know, OptumRx has taken the position that -- that  
21 its production, as Mr. Boone just said, include thousands of  
22 documents related to opioids. And I think we lay out in our  
23 opposition -- and I know Your Honor doesn't want us to  
24 repeat that -- that those materials are subject then to  
25 DR 22. And Your Honor affirmed that order, expanded it to

1 all bellwethers. The fact that those documents have not  
2 been produced in this litigation I think is actually a  
3 failure of OptumRx's because by its own description of these  
4 documents, they should have been produced into the MDL in  
5 2021 when the documents were produced in the state  
6 investigations.

7 MR. BOONE: Your Honor, I'm not going to  
8 repeat what we said in our briefing, but DR 22 really has  
9 nothing to do with anything here. That order --

10 THE COURT: Well, it might have because if you  
11 had produced them, they'd already been produced, all right?  
12 So it would not be confidential, everyone would have them.

13 MR. BOONE: Well, they would still be  
14 confidential because they would have been designated  
15 confidential. Just because they're produced in discovery,  
16 doesn't make them not confidential, doesn't make them  
17 public.

18 THE COURT: But the point is Motley Rice would  
19 have no knowledge that anyone else doesn't have, okay?  
20 They -- everyone else would know the documents as well as  
21 Mr. Boone, so at the moment -- at the moment the only -- it  
22 appears the only people who really know about the contents  
23 of the documents are, of course, OptumRx and whatever --  
24 whichever lawyers from Motley Rice have worked on those  
25 matters.

1                   MR. BOONE: And, Your Honor, you must apply  
2 the ethical rule now, not after discovery of course, but  
3 just going back to DR 22, it applies only to investigations  
4 focused on opioids. They have said the other investigations  
5 were not focused on opioids, and yet we produced tons of  
6 material about opioids in those investigations. So those  
7 things can be true and, in fact, are true in this case.

8                   MS. SINGER: And, Your Honor, I think, first  
9 of all, the definition of confidential government  
10 information is the definition of confidential government  
11 information as used in 1.11, and that's the definition that  
12 controls. We gave the Court or cited to the Court *Davis*  
13 *versus Southern Bell* on that point, and discovery materials  
14 have not been considered by the courts to be that kind of  
15 confidential government information. So I think that's the  
16 first point.

17                  THE COURT: Well, what about this specific  
18 confidentiality agreement that covers any Motley Rice  
19 attorney from in any way using -- using the documents or any  
20 knowledge derived from them in any other litigation  
21 pertaining to Optum? I mean, this is clearly other  
22 litigation pertaining to Optum.

23                  MS. SINGER: Yes, but we didn't use any of  
24 the --

25                  THE COURT: But we don't know that. We

1       don't -- it's in the firm's knowledge, okay? No one knows  
2       what you're going to use. You're the only ones who know the  
3       contents of the documents. By saying "you," I mean, the  
4       firm.

5                     MS. SINGER: No. Understood, Your Honor.

6       And I think that this is an important point of  
7       distinction under both the case law and Your Honor's prior  
8       disqualification ruling, which is there is a finite set of  
9       documents here, they are the kinds of documents that OptumRx  
10      chose to produce in response to a CID. There have been no  
11      other investigation that was conducted here, no other  
12      conferrals as happened in *Villaspring* and -- I am forgetting  
13      the other case that OptumRx relies on, but it will come to  
14      me in a second.

15       In those cases as in the case of Attorney Rendon, the  
16      information that was available to the attorney whose  
17      disqualification was sought was not known or knowable. It  
18      was a big issue, for instance, in the *LaRouche* case, that  
19      the lawyer couldn't separate what was produced in discovery  
20      and what was classified or redacted, so there was no way to  
21      parse that.

22       Here there is a precise existing body of documents,  
23      all of which we assert are covered under DR 22 and, by  
24      OptumRx's own position, would be relevant and responsive to  
25      discovery requests. So there's no knowledge that Motley

1       Rice has -- no information or documents that isn't either  
2 identifiable or subject to discovery either through DR 22 or  
3 otherwise in the MDL.

4                     THE COURT: Well, what does that  
5 confidentiality agreement mean then in this context?

6                     MS. SINGER: It means that we cannot produce  
7 those documents publicly, we can't just put them in a  
8 complaint and make them publicly. We can't share them with  
9 attorneys outside of the case. But certainly the fact that  
10 OptumRx produced these materials in response to government  
11 CIDs doesn't forever insulate them from discovery. And, in  
12 fact, DR 22 operates in the opposite direction. It requires  
13 that to be shared.

14                    MR. BOONE: Your Honor, Motley Rice also  
15 agreed that they would not use the confidential information  
16 anywhere else. It wasn't just about producing it anywhere  
17 else.

18                    THE COURT: All right. I mean -- it says they  
19 can't use it in any other litigation -- any other matters  
20 pertaining to OptumRx. It's very, very broad, so --

21                    MR. WEINBERGER: Well, Your Honor --

22                    THE COURT: What does that mean?

23                    MR. BOONE: I would argue that it means what  
24 it says.

25                    THE COURT: I'm asking Motley Rice.

1                   What does it mean? What does it mean to you?

2                   MS. SINGER: Your Honor, I did my best to  
3 explain. It means that we can't take those documents, for  
4 instance, and use them without authorization in other  
5 litigation. However, if they are produced or producable in  
6 those other cases, we are not bound to look the other way.  
7 They are not forever insulated from our knowledge.

8                   THE COURT: I'm not sure of that.

9                   All right. What about the basic principle that a  
10 public -- a government lawyer cannot be involved in --  
11 subsequently in a private capacity in any investigation or  
12 litigation which he participated as a government lawyer?

13                  I've always subscribed to that. Do you think that's  
14 not the case? And if so, how -- what limitations would you  
15 put?

16                  MS. SINGER: So we of course take 1.11  
17 seriously. And I come out of government as well, Your  
18 Honor. Not only is it what we do in our work in the public  
19 client group, but Rule 1.11 is very specific that it's about  
20 the transition from public to private. And I think it's  
21 interesting, if you look at the language of Rule 1.11, it  
22 speaks only to public to private.

23                  Comment 4 to Rule 1.11 says it recognizes that there  
24 is -- there can be an issue where a lawyer moves -- there  
25 may be a perception or a coercion problem or appearance

1       where a lawyer moves from public to another client, private  
2       or public. But the drafters of the rule did not include  
3       public or private in the text of the rule itself.

4           And then what it says was that in the circumstances  
5       laid out in the rule where it's -- where there's not a --  
6       and I'm sorry, I am talking myself in a circle here -- but  
7       the rule itself speaks only public to private -- I'm  
8       sorry -- public to private. That's not the case here.  
9       That's the advice we got from ethics counsel.

10           THE COURT: Well, wait a minute.

11           You were a public -- you still are, your firm is still  
12       a public -- you're a public lawyer. Special assistant AG  
13       for Hawaii. Okay? You are private counsel here, all right?  
14       You're private counsel, you're representing -- you're  
15       outside counsel, not a public -- not a government lawyer.  
16       You're just a plain, regular outside counsel on a --  
17       presumably a contingency arrangement with the entities that  
18       are filing these cases.

19           MS. SINGER: We have the same relationship,  
20       Your Honor, with the government employee -- the government  
21       clients we represent in the MDL that we represent in the --

22           THE COURT: Well, you can't -- you can't -- if  
23       all you were was -- if you were simply Linda, the same  
24       outside counsel for Chicago and Hawaii and DC as you are  
25       with the, you know, cities and counties who were -- who, you

1 know, are bellwether plaintiffs here, we wouldn't have this  
2 motion. There would be -- you know, you could have as many  
3 clients as you want. Optum has no -- you know -- can't tell  
4 you which private clients to represent.

5 MS. SINGER: Well, Chicago's a perfect  
6 example, Your Honor. It's a subdivision client, right? We  
7 exercised certain authority that lawyers can exercise for  
8 clients subject to their approval and control. We couldn't  
9 have gone to Hawaii and just issued a CID. Only the state  
10 attorney general could approve or direct that decision. We  
11 don't exercise that power on our own as Motley Rice.

12 MR. BOONE: But that doesn't -- not --  
13 government lawyers --

14 THE COURT: Right. That's the point. You  
15 were at least a quasi-public lawyer for those two and you  
16 were an actual public lawyer, and your firm still is an  
17 actual public lawyer for Hawaii.

18 MS. SINGER: And we represent government  
19 public clients in the opioid MDL which we had --

20 THE COURT: Right. But that's -- that's  
21 private representation. That's standard private  
22 representation.

23 And, again, if your representation of these three  
24 entities, Hawaii, DC, Chicago, had been the same -- and, you  
25 know, I'm losing -- I've forgotten the entities in the

1       bellwethers -- all right -- if it was the same as that, we  
2       wouldn't be here on this motion. The motion wouldn't have  
3       been filed. There would be no predicate for it.

4                   MS. SINGER: Again, I can't speak to --

5                   THE COURT: All right. I'm going to have to  
6       just decide it myself, but, you know, I -- I guess I'm -- I  
7       can't understand why you don't see that there is a  
8       difference between your work for these -- your firm's work  
9       for these three entities and your work for all of your other  
10      clients, and particularly the four -- you know, the four  
11      bellwether clients that you're representing.

12                  MS. SINGER: And, Your Honor, I don't mean to  
13      suggest other than we regard them all as public clients  
14      subject to the highest ethical responsibilities. These  
15      bellwethers in the MDL are seeking public remedies like  
16      abatement, right? That's not a remedy available to a  
17      private client. We see it as a straight line.

18                  MR. WEINBERGER: Your Honor --

19                  THE COURT: They're public clients because  
20      they're public -- I'm sorry -- they're public entities,  
21      they're all public entities, but the point is your -- when  
22      you're acting as a -- as a special AG exercising state power  
23      that is different from when you're outside counsel, all  
24      right? There is a difference. And what we're trying to  
25      decide here is whether that difference precludes you from

1 now being involved in -- as just outside counsel against the  
2 PBMs in these four bellwethers. That's what I got to  
3 decide. And there's lots of other lawyers. I mean,  
4 happily, we have plenty of other very well-qualified  
5 plaintiffs lawyers, so the cases aren't going to be changed  
6 or derailed or repeated or delayed in any way if I make that  
7 decision, but I --

8 MS. SINGER: And, Your Honor --

9 MR. WEINBERGER: Linda, can I interject for  
10 just a second?

11 This is Pete Weinberger, for the record.

12 Your Honor, the -- what has happened here is that  
13 Motley Rice representing governmental entities are -- now  
14 also represent the bellwethers that are governmental  
15 entities. That's a far cry from the Rendon case that you  
16 decided where a U.S. attorney -- assistant U.S. attorney who  
17 was involved in the opioid task force with the city and  
18 counties in northeastern Ohio changes to the other side and  
19 represents one of the manufacturers.

20 In this case --

21 Where there was, without any doubt, prejudice.

22 In this case there's no showing of any material  
23 prejudice, even assuming what Mr. Boone and his client are  
24 stating in their brief, because the fact is is that they  
25 either produced documents in response to the subpoenas

1 issued by Hawaii, DC, and Chicago that are either irrelevant  
2 to this litigation or they are relevant. And if they're  
3 relevant, they're ultimately discoverable.

4 So I don't -- I mean, I understand the Court's concern  
5 about the distinction because they were, you know, appointed  
6 in this special role by Hawaii, but, I mean, every one of us  
7 in this litigation represents multiple subdivisions and  
8 governmental entities. And so this is a far cry from  
9 somebody going from representing the government as -- either  
10 as in official capacity or as an outside counsel and then  
11 switching sides and representing, you know, a private person  
12 or a private corporation.

13 MR. BOONE: And, Your Honor --

14 MS. SINGER: If I may just add to what Pete  
15 was saying just a --

16 (Unreportable crosstalk.)

17 THE COURT: We can only have one person  
18 speaking at a time.

19 MR. BOONE: If I can just interject.

20 In Hawaii, Motley Rice was the government.

21 THE COURT: Well, that's the point. You see,  
22 the situation with Ms. Rendon was different. Obviously it  
23 involved one side to the other. It was as much the  
24 appearance as anything else. I never determined that  
25 Ms. Rendon had actually obtained anything confidential which

1       she might be using against the City of Cleveland. It was as  
2       much the appearance of it because she had -- she had been on  
3       their side involving in -- in a lot of private -- private  
4       matters concerning the opioid -- the opioid crisis on the  
5       side of the city, all right? And now she was going to be  
6       appearing against the city in a specific litigation, and  
7       I -- it was much as that it didn't look right.

8           And I'm -- you know, I had the same concern here.  
9           Again, the -- you can represent anyone you want, but this  
10          is -- but Motley Rice's involvement -- certainly with Hawaii  
11          and it looks like with the other two were not as -- just as  
12          outside counsel, they were government -- quasi-government  
13          appointees. In the case of Hawaii, an express appointment;  
14          and the other two, maybe tacit. But exercising --  
15          exercising official power, all right? And I just think --  
16          that's what troubles me. And I think the confidentiality  
17          agreement that Motley Rice executed is extremely broad, and  
18          I think it does cover -- cover this litigation.

19           And the problem is these -- whether the documents  
20          should have been produced or not, I don't know, but they  
21          haven't. They haven't been produced yet.

22           So, all right, I'm just going to --

23                   MS. SINGER: Your Honor, if I can --

24                   THE COURT: -- make the decision however I  
25          make it, and that will be that.

1 MS. SINGER: Can I just respond to a couple of  
2 points, points of information?

3           One, again, we were outside -- we are outside counsel  
4       to Hawaii, we were outside counsel to DC and Chicago in  
5       those capacities. That is not like being an independent  
6       counsel that the USDOJ deputized, for instance, to  
7       investigate the President. We can't do anything without the  
8       authorization or control of the attorney general's office.

11 (Unreportable crosstalk.)

12 THE COURT: All right. The four clients --  
13 four clients you're representing in these bellwethers, all  
14 right, you're not -- you're not exercising any public  
15 function, all right? You're outside counsel. Obviously you  
16 check with your client, and if your client says don't do  
17 this, you know, you could defy them, all right?

18           But the point is it's a -- you know, you're not  
19 exercising any public function, you're not issuing  
20 government subpoenas, you're not -- you're not getting  
21 documents -- government documents aren't being produced to  
22 you in a confidential manner, all right? Doesn't work that  
23 way. Everything's immediately made public -- or, you know,  
24 in the MDL repository -- any documents that are produced.

25 MS. SINGER: And, Your Honor --

1                   THE COURT: And in the other litigation it was  
2 a different relationship, that's my point. And you really  
3 haven't spoken to whether that matters. I think you're  
4 basically saying it doesn't, that it's the same as just  
5 regular outside counsel.

6                   MS. SINGER: I'm saying that Rule 1.11, Your  
7 Honor, speaks to private clients. It doesn't speak to civil  
8 litigation or private --

9                   THE COURT: But the point is, Ms. Singer, this  
10 wasn't really your client. You're saying -- I mean, you're  
11 saying it's some sort of a hybrid, it was just -- it was the  
12 same as a contingency client because you were being paid on  
13 a contingency arrangement, which seems odd -- which seems  
14 odd to be a public -- a sort of a quasi-public official but  
15 being paid on a contingency arrangement.

16                  MS. SINGER: I think that's actually really  
17 important -- it is a cornerstone of how AGs -- and I say  
18 this as a former attorney gen -- are able to carry out their  
19 functions and level the playing fields with large  
20 corporations in high-stakes complex civil litigation going  
21 back to tobacco. And Your Honor knows as well as anybody  
22 the important role that outside counsel have played to  
23 states and subdivisions in achieving the results we have in  
24 this case, and we feel very proud of that and humble and  
25 grateful for the chance to do it and mindful of our ethical

1       responsibilities throughout.

2           But, again, 1.11 speaks to private client. I do think  
3       that Your Honor can resolve this on the question of  
4       confidential government information. And it is very  
5       different than the prior disqualification where, as Your  
6       Honor will recall, police captain testified that he provided  
7       information to the U.S. attorney confidentially inside bars  
8       that it was in the -- in the context of a trusted  
9       relationship where he shared things that he wouldn't have,  
10      right? That was not either identifiable or discovered  
11      material. In fact, like *Kronberg* and *Villaspring*, it  
12      couldn't be identified. That's very different. And DOJ  
13      even weighed in to say that she had access to confidential  
14      information.

15           The fact that OptumRx hasn't produced these documents  
16      yet is we think a failing of OptumRx under DR 22. It should  
17      have been produced already, they will certainly --

18           THE COURT: Just so it's clear, because I want  
19      to move on, I'm just -- I'll decide it, and however I decide  
20      it, I'll decide it -- are you basically saying that  
21      there's -- there are no differences in what you can and  
22      can't do --

23           MS. SINGER: No.

24           THE COURT: -- based on whether -- based on  
25      whether you're retained by a city or county as outside

1       counsel or whether you are a deputy attorney general or a  
2       deputy city counsel?

3                   MS. SINGER: Of course not, Your Honor. I'm  
4       sorry if that's the --

5                   THE COURT: Well, then what are the --

6                   MS. SINGER: Attorneys general have different  
7       authorities than most subdivisions.

8                   THE COURT: Well, what are the differences in  
9       terms of your subsequent -- your subsequent work? That's  
10      the point. That's what I'm trying to get at.

11                  What differences -- what limitations? Are there any  
12      additional limitations on your subsequent work as a lawyer,  
13      who you can represent, what litigation you can be in?

14                  MS. SINGER: We can't use confidential  
15      government information obtained in the course of the  
16      representation of a public entity in litigation for private  
17      clients. That's the limit of --

18                  THE COURT: Okay. Well, that's -- at the  
19      moment --

20                  MR. BOONE: Your Honor --

21                  THE COURT: At the moment you got confidential  
22      government information on OptumRx. Whether you can use it  
23      or not, I don't know because I don't even know exactly what  
24      it is. But that's the concern. You got it. Your firm has  
25      it.

1                   MS. SINGER: We have a set of documents, all  
2 of which are discovery materials, discovered -- in fact,  
3 OptumRx had previously produced them to Minnesota and then  
4 reproduced them subsequently to attorneys general.

5                   But it can't be the rule either, Your Honor, because  
6 1.11 speaks to a balancing test, right? And there's the --  
7 the interest in preserving the appearance and fact of  
8 fairness to the entity being investigated or subject to  
9 litigation, but there's also the interest in lawyers being  
10 able to work from government and go on to do other important  
11 and meaningful cases. That is an explicit goal of the rule  
12 as well. And that's why the comment specifically speaks, as  
13 Mr. Weinberger said, to prejudice and a balancing of  
14 interest. And there is an interest in government being able  
15 to get access to these lawyers.

16                  And the rule that OptumRx is proposing here would mean  
17 that if you've litigated against a defendant in a public  
18 capacity, if we were special counsel to DOJ in a tax case  
19 or -- you know, I've represented the State of Nevada in  
20 litigation against Bank of America, that because I gained  
21 insights into their business model or strategies, that I  
22 would be forever precluded from litigating against Bank of  
23 America. The confidentiality agreement --

24                  THE COURT: Well, I don't think they're taking  
25 that point -- they're making that point, that you could

1 never -- never litigate any case against OptumRx on any  
2 other subject.

3 I mean, am I right, Mr. Boone?

4 If that's your argument, that's way too --

5 MR. BOONE: That's right, Your Honor. What  
6 we're saying --

7 (Unreportable crosstalk.)

8 MR. BOONE: What we're saying is that Motley  
9 Rice investigated OptumRx using government power, they were  
10 the government, they cannot now sue OptumRx on related  
11 issues. That's what we're saying.

12 THE COURT: Well, that's the point. It's  
13 related. So I'll just have to decide if it's closely-enough  
14 related, all right? That seems to me if it's -- if it's  
15 completely unrelated, you know, if it was a tax case, we  
16 wouldn't be here. Or if we were, I would have decided it  
17 already. I wouldn't have needed this discussion, all right?

18 So it's -- the question is is it closely-enough  
19 related, so I'll have to figure that out and --

20 MR. WEINBERGER: Your Honor, one other  
21 thing -- one other thing that the -- I want to get -- I  
22 would like to give a little context to this because I think  
23 what's happening here is -- is a broader concern, and that  
24 is that any time somebody is employed by a state attorney  
25 general as private counsel, if the rule is such that you

1 can't then, you know, turn around and represent other  
2 governmental entities against that defendant, that is  
3 exactly what the U.S. Chamber of Commerce and these  
4 defendants are attempting to do.

5 There is a move afoot -- and this is part of it, Your  
6 Honor -- in trying to curtail the rights of state and cities  
7 and counties to retain outside counsel who are prepared to  
8 represent them on a contingent fee and are prepared -- as we  
9 were and did in this case -- to fund the litigation under  
10 circumstances where the governmental entities cannot afford  
11 under their budgets to pay either hourly fees or litigation  
12 expenses, and -- and, you know, if you grant this motion,  
13 Your Honor --

14 THE COURT: Peter, here, I applaud you for  
15 doing that, and, again, if we were -- if Motley Rice was  
16 just I'll call conventional outside counsel for Chicago and  
17 Hawaii and DC, there would be no motion, or if there was, I  
18 would have just denied it out of hand, okay?

19 The concern is this sort of a hybrid where you're  
20 being -- you're being paid as like conventional outside  
21 counsel, but you're exercising government power. I wasn't  
22 aware that that existed until this motion was filed.

23 MR. WEINBERGER: But, Your Honor, I haven't  
24 heard --

25 THE COURT: That's what --

1 MR. WEINBERGER: I haven't heard Optum say  
2 they'd produce something in -- to Hawaii or these other two  
3 entities because they were subpoenas from an attorney  
4 general that they, you know, wouldn't have produced had they  
5 been involved in litigation with one of the cities and  
6 counties that we represent. I mean, that's -- that's the  
7 rub. The --

14 MR. WEINBERGER: But the scope of the --

15 MR. BOONE: Your Honor --

THE COURT: Let's move --

17 (Unreportable crosstalk.)

18 MB. BOONE: If I can bring

THE COURT: I will make my decision and tell you what it is.

will be that. I'm not sure how helpful this has been, but  
I've asked the questions I've asked, and I'll make a  
decision. All right. And I want to leave some time for the  
other motion. All right.

24 MR. RICE: Your Honor?

25 THE COURT: Yes.

1                           MR. RICE: Just a factual point.

2                           Everybody keeps saying "issued the subpoenas." It's  
3 my understanding that the government lawyers, the AG's  
4 office, issued the subpoenas, got the documents, and we were  
5 their outside counsel helping them analyze the documents.

6                           THE COURT: Well, no, Joe. I -- I thought  
7 that you --

8                           MR. BOONE: That's not true, Your Honor. They  
9 were the government.

10                          THE COURT: -- your office issued the  
11 subpoenas -- issued the subpoenas as special AGs, that you  
12 were exercising government authority, that the state or the  
13 city deputized you. All right?

14                          MS. SINGER: Just to be precise, so you have  
15 the facts, each of the public entities signed and issued the  
16 CIDs, the documents were delivered to Motley Rice, but the  
17 subpoenas were issued by the government entities.

18                          MR. BOONE: But, Your Honor, in Hawaii they  
19 already admitted they were special deputy attorney  
20 general -- attorneys general. In Chicago they were special  
21 assistant corporate counsel. In DC they were appointed by  
22 authority vested in the attorney general. That's in the  
23 record. They were exercising government authority in each  
24 case. I can't believe they're even arguing to the contrary.

25                          THE COURT: I -- again, what -- this has not

1       been particularly helpful because I think each side staked  
2       out extreme positions, and I'm going to have to parse it  
3       through, all right?

4            You know, Optum just wants to throw Motley Rice off  
5       because I think you want to throw them off, all right?

6            Motley Rice wants to stay on, and Motley Rice is saying  
7       there's really no -- that -- that the label that they had  
8       doesn't really matter. All right? They were just outside  
9       counsel and --

10           MR. BOONE: Your Honor, look, we have --

11           THE COURT: I'm going to move on --

12           MR. BOONE: Both of our experts have said that  
13       this is not a close case. They both said that. They're on  
14       the line today. I mean, I...

15           With that, I won't say anything else.

16           THE COURT: All right. Well, again, maybe  
17       it's my fault this has not been particularly helpful. I'll  
18       make my decision.

19           All right. The other motion, I don't want to spend a  
20       lot of time on this. I got just a few questions.

21           There was something in the PEC's brief that I did not  
22       understand. Let me go back a bit.

23           If I had learned from my pharmacy case, pharmacies  
24       have a corresponding responsibility with the physician to  
25       make sure that the prescription is issued for a valid

1       medical purpose and it is not -- it is not being diverted,  
2       sold, otherwise misused by the particular patient.

3           My question is for a mail-order pharmacy, what state  
4       regulates a mail-order pharmacy?

5           Well, I should go back.

6           Does a mail-order pharmacy have the same corresponding  
7       responsibility that a brick-and-mortar pharmacy has?

8           MR. WEINBERGER: The answer is yes, Your  
9       Honor. They are a pharmacy, they're required to be  
10      registered under the CSA, and they have all the  
11      responsibilities -- they have the corresponding  
12      responsibility just like a brick and mortar --

13           THE COURT: All right. Well, who -- which  
14      state -- which state regulates a mail-order pharmacy?

15           MR. WEINBERGER: I believe they have to be  
16      registered in any state where they -- where -- to which the  
17      drug is dispensed.

18           MS. BIERSTEIN: Your Honor, this is Andrea  
19      Bierstein.

20           If I can add, I would say that I believe in the  
21      complaint we -- in the proposed complaints for each  
22      plaintiff, we alleged that the mail-order pharmacies are  
23      registered with the state board of pharmacy in the relevant  
24      state in each of the complaints.

25           THE COURT: So the state -- plaintiffs believe

1 that the pharmacy -- mail-order pharmacy has to be  
2 registered in each state to which it sends --

3 (Unreportable crosstalk.)

4 MS. BIERSTEIN: Yes, Your Honor.

5 MR. WEINBERGER: Do not forget, you're talking  
6 about two different registrations, Your Honor. You're  
7 talking about the federal registrations under the DEA  
8 regulations --

9 THE COURT: Well, I know the federal is --

10 MR. WEINBERGER: -- under the CSA and the  
11 state boards of pharmacy.

12 THE COURT: All right.

13 Did the PBMs agree that when -- your mail-order  
14 pharmacies had to be registered in each state to which you  
15 mailed prescriptions?

16 MS. MERKEL: We agree with that, Your Honor.

17 Speaking on behalf -- on behalf of Express Scripts, and  
18 that's key reason why we think essentially what these claims  
19 against the mail-order pharmacies are doing is rehashing a  
20 lot of what's already been covered and introducing a lot of  
21 complex arguments and issues associated with those  
22 responsibilities vis-à-vis a pharmacy that simply don't  
23 apply to PBMs. PBMs are not DEA registrants. They're not  
24 registrants. They don't dispense prescription drugs and  
25 so --

1                   THE COURT: Well, wait a minute. I thought  
2 you do -- I thought your pharmacies do dispense --

3                   MS. MERKEL: The pharmacies do, but that's a  
4 separate entity from the PBM. Express Scripts itself is not  
5 a registrant with the DEA or --

6                   THE COURT: All right. Then --

7                   MR. WEINBERGER: Your Honor, there's one  
8 other -- can I just --

9                   THE COURT: All right. I'm going to move on.

10                  MR. WEINBERGER: There's one other important  
11 point, Your Honor, if I...

12                  So what we know. So take -- set aside the whole issue  
13 of their dispensing this as mail-order pharmacies. We know  
14 that at the point of dispensing by, say, a CVS, if that  
15 patient is insured by an entity that uses, say, for example,  
16 Optum, at the point of dispensing, the computer system  
17 notifies the PBM, and the PBM does their own DUR, their own  
18 investigation before issuing a -- before allowing payment.  
19 So in effect they are involved -- even setting aside their  
20 mail-order pharmacies, they are involved in the dispensing  
21 process because they're doing their own individual patient  
22 and doctor analysis with respect to that prescription.

23                  THE COURT: I was going to get to that.  
24 There's a statement in the plaintiff's brief that the  
25 original complaints -- the existing complaints, 40

1 amendments contain in-network dispensing claims. Is that  
2 what you're referring to? I mean, is that what an  
3 in-network -- I mean --

4 MS. BIERSTEIN: Yes, Your Honor.

5 This is Andrea Bierstein again.

6 So an in-network claim is when the PBM is operating as  
7 a PBM, it contracts with a network of pharmacies so that  
8 when the plan beneficiary goes to fill a prescription, the  
9 pharmacy, because it has a relationship with the PBM, it can  
10 just take the co-pay, and the PBM handles everything else on  
11 the back end.

12 So part of that relationship with the in-network  
13 pharmacies, the PBMs provide this drug utilization review  
14 service, so they insert themselves into the dispensing  
15 process even when they are not the dispenser. So that's why  
16 we say that in the original complaints, because we were  
17 looking at their role in the dispensing process for their  
18 in-network pharmacies, dispensing was already in the case,  
19 even though we hadn't specifically focused on the PBM as  
20 dispenser. That's a different relationship. But they were  
21 already involved in --

22 THE COURT: All right. This is what -- this  
23 is what I'll call typical PBM work, which is they contract  
24 with insurers to -- to administratively handle claims, and  
25 part of what they do is determine if -- you know, if the

1 claims are valid, if -- drug -- et cetera. So -- but that's  
2 not dispensing the prescriptions themselves, that would be  
3 mail-order dispensing. So --

4 MR. BOONE: And --

5 (Unreportable crosstalk.)

6 MS. BIERSTEIN: It's not dispensing -- Your  
7 Honor, but it's not the relationship with the TPP, with the  
8 payor in that instance that we're focusing on, it's the  
9 separate relationship with the in-network pharmacy, that is  
10 they have a relationship with the payor, but then they go  
11 and contract with the pharmacy as well, and they say to the  
12 pharmacy, "We're going to make your life easy. You don't  
13 have to check with the insurer and figure out what the  
14 coverage is and figure out if this person should be getting  
15 this drug. We, the PBM, will do that for you."

16 And it's part of their role as PBM to smooth the  
17 transaction between the beneficiary and the insurer -- is  
18 for them to contract separately with the pharmacy. So  
19 that's why it is standard PBM work, but it's not -- doesn't  
20 grow out of only the relationship with the insurer, it grows  
21 out of the independent contracts that they enter into with  
22 network pharmacies when they say, "Let us help you with your  
23 dispensing. We'll point out utilization review problems.  
24 We will make your dispensing easier."

25 THE COURT: All right. But, again --

1 MS. BIERSTEIN: That's the --

2 THE COURT: -- the -- is part of that what  
3 I'll call traditional PBM work?

4 MS. BIERSTEIN: Yes.

5 THE COURT: Is the PBM supposed to look at the  
6 red flags that we dealt with in Track 3?

7 I guess I'm asking the PBMs that. Is part of your  
8 traditional PBM work that Ms. Bierstein has just  
9 described -- which obviously you do, and I was very familiar  
10 with -- do you do red-flag analysis of individual  
11 prescriptions?

12 MS. MERKEL: What we do is provide essentially  
13 that -- it was built into Ms. Bierstein's description of it,  
14 it's on the back end we will provide the services that they  
15 contracted with us to provide. So we are doing essentially  
16 claims processing and claims analysis on the back end. We  
17 are not interfacing directly with any patients.

18 So we are not the ones who determine to dispense the  
19 drugs. We are essentially providing data that can be  
20 consulted by our clients according to the information that  
21 our other clients have told us to make available to them.  
22 So it's categorically a different role --

23 THE COURT: I --

24 (Unreportable crosstalk.)

25 MR. WEINBERGER: Didn't get an answer to your

1 question --

2 MR. BOONE: Your Honor, so the CSA and  
3 pharmacy regulations do not apply to that aspect of the  
4 PBM's business. No one outside of the PEC calls that  
5 dispensing. I've never heard it actually.

6 THE COURT: All right.

7 MR. WEINBERGER: Your Honor, the answer is --  
8 the answer is exactly what you saw in the front -- in the  
9 pharmacy cases where we utilized -- we said to the -- we  
10 said that the pharmacies had an obligation to utilize the  
11 data they had to determine whether or not there were any red  
12 flags and to ensure that those red flags get, you know, due  
13 diligence before and get resolved before there is  
14 dispensing -- that is very --

15 THE COURT: All right. That --

16 MR. WEINBERGER: That is very much what the  
17 PBM does when they -- through their computer or by phone,  
18 that there's a patient at the pharmacy, the pharmacist is  
19 determining whether or not to fill, and one of the things  
20 they have to do is check with the insurance. And the PBM  
21 acts as that conduit, that go-between. And we know because  
22 we already have the documents that demonstrate this, we know  
23 that they use their data to determine whether or not the  
24 data reflects any red flags. And -- and our --

25 MS. BIERSTEIN: Your Honor, if I can add to

1 what Mr. Weinberger's saying.

2           What you would see in our complaint is an allegation  
3 about something called concurrent DUR, concurrent drug  
4 utilization review. Concurrent DUR happens at the moment of  
5 dispensing. So the analysis the PBM is doing is not simply  
6 after-the-fact later analytics, "oh, in retrospect I see a  
7 red flag," although that is part of it because they have the  
8 data, they can see the red flags.

9           But the concurrent DUR puts them in the business of --  
10 now the pharmacy can't offload its responsibility  
11 altogether. They still have the corresponding  
12 responsibility. But the PBM in providing CDUR, concurrent  
13 drug utilization review, says, "We're going to help you with  
14 this red flag analysis because our data will show some red  
15 flags, and our data can give the pharmacist guidance on  
16 whether or not to fill."

17           So I think the answer is -- are they involved in red  
18 flags in their role as PBM, I think the answer is yes.

19 Whether or not --

20           THE COURT: But do the PBMs agree with that?

21 What I'm --

22           MR. BOONE: No, Your Honor. Those programs we  
23 offered to our clients. They are not required by the CSA,  
24 they're not required by any state pharmacy regulation.

25           MR. WEINBERGER: Well, Your Honor, if --

1                   MR. BOONE: It's actually --

2                   MR. WEINBERGER: We're at the stage for a  
3 motion for leave to amend.

4                   THE COURT: What I --

5                   (Unreportable crosstalk.)

6                   MR. WEINBERGER: Subject to a motion to  
7 dismiss or a summary judgment, that's for later on.

8                   THE COURT: Hold it.

9                   I'm just trying to find out if it matters, okay?

10                  The parties -- I mean, the key issue to me is whether  
11 I allow the plaintiffs to include traditional pharmacy  
12 dispensing claims for the PBMs as mail-order pharmacies,  
13 okay? And I have -- up until today I thought there was a  
14 clear distinction between what the PBMs do as traditional  
15 PBM work, which is what is -- we've just been talking about,  
16 interfacing, administering claims, and serving -- just  
17 like -- just like the brick-and-mortar pharmacy, only  
18 filling prescriptions by mail, all right? As a pharmacist,  
19 all right?

20                  But the discussion I just heard suggests there really  
21 isn't a difference and that it's all, you know, maybe two  
22 sides of the same coin. In which case, even if I don't  
23 allow the -- even if I don't allow the amendments, the PBMs  
24 may bring in all the -- the major national pharmacies into  
25 this case, try to bring them in as third-party defendants so

1 that it really, you know -- I can't keep them out, so it  
2 doesn't really matter, you know -- might as well include the  
3 dispensing claims because they're going to be in no matter  
4 what.

5 MR. BOONE: Well, Your Honor, there is --  
6 there is a difference between dispensing on the one hand and  
7 PBM services on the other. They're trying to blur the lines  
8 between those to suit their own purposes, but there's a  
9 clear distinction.

10 THE COURT: Are you --

11 MS. MERKEL: I just want to --

12 MS. BIERSTEIN: We're not saying --

13 (Unreportable crosstalk.)

14 THE COURT: Hold it.

15 Let me put it to you, Mr. Boone, and whoever else  
16 for -- you know, with I guess Ms. Merkel, whoever it is for  
17 Express Scripts, all right?

18 You've already said that if I allowed -- if I allow  
19 the complaints to include mail-order dispensing claims,  
20 you're going to move to bring in many other pharmacies, all  
21 right? And the plaintiffs have said, "Oh, you know, they  
22 weren't in Track 3, so they won't be in here." Well, they  
23 weren't in Track 3 because the Track 3 defendants chose not  
24 to bring them in. I told them they could have. So I'll let  
25 you bring them in.

1                   Are you telling me you will not move to bring them in  
2 if I limit -- if I don't allow the amendments for mail-order  
3 pharmacies and I just leave the allegations for, you know,  
4 the in-network dispensing claims that are there in the  
5 existing complaints?

6                   MR. BOONE: I would need to talk to my client  
7 about that, Your Honor. But as I understand it, the answer  
8 would be no. If you don't allow dispensing claims against  
9 OptumRx and Express Scripts, I very seriously doubt that  
10 we're going to try to implead as defendants other  
11 pharmacies.

12                  MS. MERKEL: Yeah. I would give the same  
13 answer, Your Honor. We think it's significantly less likely  
14 that we would need to bring other parties into the claims,  
15 and I think an important distinction --

16                  THE COURT: Maybe less likely, but that's  
17 hedging it because the point is if they're --

18                  MS. MERKEL: We need to --

19                  THE COURT: As I see it, the only reason why I  
20 would not allow them in is because I don't want to turn  
21 these bellwethers into Track 3, you know, number 2. We've  
22 been there, we've done that, all right? So we don't need it  
23 again.

24                  MS. MERKEL: And that's exactly what we're  
25 concerned would happen, Your Honor.

1                   And the additional factor here is that, you know,  
2 these mail-order pharmacy entities that we're talking about  
3 have something like less than one percent combined of the  
4 relevant market share of dispensing. We understand we've  
5 been selected as PBMs to serve as bellwether defendants in  
6 PBM cases, but we absolutely would be looking to share the  
7 burden of acting as defendants in dispensing cases if we're  
8 going to be essentially relitigating all of the issues from  
9 Track 3.

10                  MS. BIERSTEIN: Your Honor, if I could just  
11 respond to that briefly.

12                  I understand the Court may not want to try another  
13 case against a dispenser because, as you've said, you've  
14 been through that, and that's a down-the-road issue. And at  
15 the -- to the extent that they are in discovery as a  
16 dispenser may also be a down-the-road issue. But if we  
17 can't amend our complaint to include claims against them as  
18 dispensers, then we may not have -- we likely will not have  
19 an opportunity to preserve that claim at all, and in the  
20 same way, Your Honor, that CVS and Walgreens and Walmart  
21 were in litigation in CT3 as both distributors and  
22 dispensers.

23                  Now, the Court could have chosen to say, "I'm only  
24 going to hear the dispensing side," but the Court would not  
25 have forced us to abandon our claims against them as

1       distributors, even if the Court had chosen to stay or sever  
2       those claims. So we're at a very early stage, this is just  
3       can we plead the claim.

4           Your Honor may decide we can plead it. And then after  
5       the motions to dismiss flesh out the contours of what the  
6       legal theories are, you may say, "Here's what we're going to  
7       actively litigate. Here's what we're going to go forward  
8       on." The judge who tries these may say, "I don't want to  
9       try that part of the case. It's already been done. We know  
10      what that looks like." But we haven't done it against these  
11      defendants, and our clients have claims against them.

12           And for Your Honor to deny them their only shot or  
13       what is likely their only shot to pursue a claim they have  
14       against this defendant that is -- that they have the ability  
15       to bring because administratively in the MDL it may not be a  
16       convenient time to hear it, I think it's mixing up two  
17       things. Your Honor has all that administrative authority to  
18       manage the case, but right now we're just looking to have  
19       the opportunity to get our claims on file and preserve them,  
20       and then we'll figure out and Your Honor will figure out how  
21       it makes sense to proceed in this litigation.

22           MR. BOONE: Your Honor, on the question that  
23       you asked, I can speak to my client, and I think we could  
24       give you a definitive answer by the end of the week.

25           THE COURT: All right. Well, I...

1                   MR. BOONE: But I suspect that the answer is  
2 going to be no, we're not going to try to bring in  
3 pharmacies as defendants if there are no dispensing claims  
4 against OptumRx's home delivery pharmacy -- mail-order  
5 pharmacy.

6                   THE COURT: I'm just trying -- I'm not sure if  
7 there's -- it may be so interrelated that there's no  
8 meaningful way to separate them even for discovery. I don't  
9 know.

10                  MS. MERKEL: I just don't think that's true,  
11 Your Honor. I mean, I think the really important  
12 distinction, even if the PBM entities are sort of -- they're  
13 in the computer with the pharmacist and the pharmacist can  
14 consult information as part of the CDUR process that was  
15 being described previously, there's always a pharmacy  
16 standing between the PBM and the patient who gets the drug.  
17 That's a really important distinction.

18                  So the services that we provide to pharmacies are  
19 services that can be litigated in these bellwethers, they're  
20 classic PBM services, but it's not that -- they don't have  
21 the same obligation and the -- the action of dispensing a  
22 drug is always intermediated by a pharmacy that has the  
23 obligation under its state and federal, you know,  
24 registrations to be the dispenser of those drugs, and  
25 so it's --

1                   THE COURT: I understand that, but say  
2 you're in -- say you're in a given community, all right? I  
3 mean, what a PBM does, what they learn, what they know in  
4 one aspect to their business they can apply to the other,  
5 so --

6                   MS. MERKEL: Well --

7                   THE COURT: I mean, we -- and they --

8                   MR. WEINBERGER: And that --

9                   THE COURT: Both sides --

10                  MR. WEINBERGER: That ignores -- that ignores  
11 the fact that the one -- the really important issue that  
12 they are dealing with is whether or not to pay for the drug.  
13 I mean --

14                  MS. MERKEL: Yeah, but that's a classic --  
15 that's a classic PBM service. I mean, we're happy to --

16                  MR. WEINBERGER: And not --

17                  (Unreportable crosstalk.)

18                  MS. MERKEL: Your Honor acknowledged this at  
19 the December 1st hearing, it's -- we can take discovery into  
20 what we learned from our mail-order pharmacy business, and  
21 to the extent that that informed what we were doing as a  
22 PBM, you know, I'll preview to you that those were operated  
23 as very separate businesses, but that is a categorically  
24 different situation, giving some discovery into that topic  
25 from actually litigating and adjudicating the liability of

1       the pharmacy entities' claw dispensers who have that DEA  
2       registration, have that state registration, would be dealing  
3       with the exact same legal issues that were at play in  
4       Track 3 that would not be at play in this bellwether  
5       litigation unless these claims are added to the amended  
6       complaint.

7                 So we think the legal complexity is significant, and  
8       it's just categorically different between a PBM and a  
9       pharmacy, mail-order or otherwise.

10               MS. BIERSTEIN: Your Honor, if I could make  
11       two --

12               THE COURT: All right. I think I -- again,  
13       the issue is whether or not I allow the complaints to be  
14       amended. That decision doesn't dictate whether any of them  
15       are going to be tried as any of these claims -- what claims  
16       will be actually tried if there are trials --

17               MS. MERKEL: And we did make a --

18               THE COURT: -- decisions --

19               (Unreportable crosstalk.)

20               MS. MERKEL: I'm sorry, Your Honor.

21       We did make an application to sever and stay the  
22       claims in the alternative. We think they shouldn't be  
23       added, but we think it's important to the extent, you know,  
24       we're dealing with this now to sever the claims now because  
25       we have an already very aggressive discovery schedule that

1       we've agreed to. We're working very hard to move forward  
2       with that. But we think if these additional issues are  
3       brought into the case, they're going to delay the case from  
4       day one.

5           And so we're concerned that the progress of discovery  
6       is going to be significantly bogged down by having these  
7       additional issues in the complaint. That's why we argue  
8       that it's important to the extent these claims are going to  
9       be allowed in, and we don't think they should be, that they  
10      be severed and stayed, so they're not progressing on the  
11      same track and we're not spending, you know, significant  
12      amounts of time dealing with essentially pharmacy discovery  
13      as opposed PBM discovery.

14           THE COURT: Well, I can deal with -- I can  
15      deal with that down the road. The plaintiffs might have to  
16      make some tradeoffs, all right? They're the ones who want  
17      the cases to proceed expeditiously, and so if there's a  
18      tradeoff between -- you know, if it takes another six, nine  
19      months, if we fully discover and investigate dispensing  
20      claims or -- might have to make that decision, all right?  
21      But I don't have to make that now because I don't know  
22      what -- you know, what the facts are. But we may get there.

23           So I understand the issue is whether or not the  
24      plaintiffs can make the claims in their complaints -- amend  
25      the claims to include that -- dispensing claims, mail-order

1 dispensing claims.

2 MR. BOONE: Your Honor, they're also trying to  
3 add what I'll call *Mackenzie*-type claims against Optum  
4 Insight, which is not a PBM. And we think that's improper  
5 for all the reasons we set out in our briefing. And I won't  
6 repeat those arguments here.

7 Same goes for the cash card entities. I mean, in  
8 fact --

9 (Unclear speech; clarification requested by  
10 court reporter.)

11 MR. BOONE: So they're trying to include ten  
12 entities. Only one is a PBM, OptumRx. The others are data  
13 companies, and they have *Mackenzie*-type claims, they have  
14 cash card claims, they have nothing to do with PBM services,  
15 nothing to do with dispensing claims, and so they should be  
16 out too.

17 MR. WEINBERGER: Your Honor --

18 THE COURT: All right. Do the plaintiffs want  
19 to speak to ones that include those?

20 MR. WEINBERGER: Your Honor, the way that  
21 these companies are organized we believe is directly related  
22 to the -- our ability to discover how these various entities  
23 are intertwined and relate directly then to their activities  
24 associated with opioids. And, again, at the end of  
25 discovery, if we find that these entities do not provide

1 information or are not involved in some way in -- in  
2 creating this opioid epidemic, they will obviously be out.  
3 But for purposes now, as you've said multiple times, it's  
4 only whether or not we can name them in the complaint and  
5 under the allegations that we had set forth.

6 THE COURT: Well, I should just say that the  
7 plaintiff's RICO claims, whether they can prove them or not,  
8 are that the PBMs conspired with the manufacturers to help  
9 push and promote these opioids, that they were safe and  
10 effective, knowing that they weren't. I mean, that's a  
11 Mackenzie-type claim. That was the allegation against  
12 Mackenzie. Well -- so they can certainly make those claims,  
13 whether they can prove them or not, that's not the issue  
14 now.

15 All right. I think I got a pretty good understanding.  
16 I guess I want to -- either -- anyone else from my group  
17 have a question that they don't think I asked or didn't ask  
18 it in a clear way?

19 MR. COHEN: I do not, Judge. Thank you.

20 THE COURT: Okay. All right.

21 MR. BORDEN: Thank you. No, Judge.

22 THE COURT: Okay.

23 All right. Well, I appreciate everyone's time and  
24 helping me think these things through. And I'll make my  
25 decisions as expeditiously as I can because I know both

1 motions are important to all sides.

2 Okay. Thank you very much.

3 (Proceedings concluded at 3:16 p.m.)

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6 **C E R T I F I C A T E**

7

8 I certify that the foregoing is a correct transcript  
9 of the record of proceedings in the above-entitled matter  
10 prepared from my stenotype notes.

11

/s/ Gregory S. Mizzanin February 13, 2024  
12 GREGORY S. MIZANIN, RDR, CRR DATE

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